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IN THE

Supreme Court of the United States

October Term, 1940

No. 774

O. C. ALTMAIER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND MEMORANDUM IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

O. C. Altmaier, a resident of Columbus, Ohio, represents to this Honorable Court that he has been aggrieved by a certain final judgment of the United States Circuit Court of Appeals for the Sixth Circuit, lately passed in the case pending in that court numbered 8367 upon its files and dockets, wherein said O. C. Altmaier is petitioner and the Commissioner of Internal Revenue is respondent.

Invoking Section 240(a) of the Judicial Code (United States Code, Title 28, Section 347), as amended by the Act of Congress approved February 13, 1925, C. 229, Section 1, 43 Stat. 938, said O. C. Altmaier petitions that said Circuit Court of Appeals for the Sixth Circuit may be required by

a writ of *certiorari* to certify said cause in its entirety to this court for its review and determination.

Petitioner represents that the final judgment complained of was passed and entered by the said Circuit Court of Appeals for the Sixth Circuit (Cir. JJ. Hicks, Arant and Martin sitting) on the 13th day of December, 1940 (R. 89).

The opinion of said Circuit Court of Appeals—Member Martin, Circuit Judge—is reported in 116 F. 2d 162, and may be found in the record at pages 90 to 95.

Final judgment of the trial court, namely, the United States Board of Tax Appeals (Ernest VanFossan, Member, sitting) appears at page 60 of the record and the findings of fact and opinion of the court appear at pages 52 to 60 thereof.

SUMMARY STATEMENT OF CAUSE OF ACTION AND RULINGS BY THE LOWER COURTS

On March 13, 1936, respondent, the Commissioner of Internal Revenue, issued to petitioner a deficiency notice in which petitioner was advised that the Commissioner proposed to assess additional federal income taxes for the years 1932 and 1933 as follows:

	Deficiency
1932.	$ 6,862.80
1933.	9,311.74
Total.....	$16,174.54

Said proposed deficiencies in federal income taxes for said years were based almost entirely upon respondent's contention that petitioner should include in his taxable income for said years the income realized by three trusts created by petitioner on February 18, 1932, respondent contending that the income of said trusts so created by petitioner was taxable to him under the provisions of Section

167 of the Revenue Act of 1932 (R. 13 and 14). Respondent thus increased petitioner's income for the year 1932 by $28,800 and for the year 1933 by $42,727.43 (R. 10, 11 and 57).

In said notice of deficiency respondent abandoned a proposition theretofore adopted by him, namely, that petitioner's wife (Mary Kaufman Altmaier) did not have a "substantial beneficial interest" in each of said trusts, specifically holding that petitioner's wife did hold "a substantial beneficial interest in each of said trusts" (R. 13).

On June 5, 1936, petitioner filed before the United States Board of Tax Appeals his petition alleging, among other things, that the $28,800 income for the year 1932 and the $42,727.43 income for the year 1933 thus added by respondent to petitioner's income for said years, did not represent taxable income to petitioner but that said items of income were properly taxable to the fiduciaries of said three trusts and that federal income taxes upon said income had been paid by said fiduciaries (R. 3 to 50).

Respondent filed his answer consisting of a general denial (R. 51) but at the time of trial of the cause before the United States Board of Tax Appeals counsel for respondent stated that the issue was the taxability to petitioner of the income of said three trusts under Section 167 of the Revenue Act of 1932.

The United States Board of Tax Appeals found (R. 59 and 60) that the income of said trusts was being held or accumulated for future distribution to the grantor and that said income was properly taxable to petitioner under the provisions of Section 167 of the Revenue Act of 1932, thus affirming the Commissioner's action.

Upon review applied for by petitioner the United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the United States Board of Tax

Appeals (R. 90 to 95). A summary of the pertinent facts found in the opinion of the reviewing court and in the record might be restated as follows:

1. Petitioner by three trust instruments all executed February 18, 1932, constituted his wife (Mary Kaufman Altmaier) trustee of a total number of 3600 shares of the common stock of a corporation.

2. The documents were identical except that the three minor children of the petitioner and his wife were each respectively named as co-beneficiary with the wife in one of the three separate trust indentures.

3. Shortly after the trusts became operative, pursuant to power reserved by the petitioner, The City National Bank of Columbus, Ohio, was appointed co-trustee with Mrs. Altmaier.

4. Each of the three agreements provided, *inter alia*, that, subject to the rights reserved to the settlor and his wife, the trustee should hold, manage and control the trust estate under the granted rights and powers.

5. Provision was made that the net income of the trust estate in each instance should be accumulated, invested and added to the principal during the remainder of petitioner's life or until his wife's death should she predecease him.

6. Each trust indenture directed the trustee to pay beginning at the death of petitioner, the entire net income to the wife for the remainder of her life; unless prior to her death, the trust fund should be exhausted as a result of permitted encroachments upon the principal.

7. The trustee was directed to pay, beginning at the death of the wife, the entire net income to the settlor for the remainder of his life.

8. Upon the death of the surviving husband or wife the trustee had the imposed duty of distribution to settlor's

named child, or to the latter's next of kin, in compliance with the elaborate provisions of the trust agreement.

9. During petitioner's lifetime or until he should be judicially declared legally incompetent, petitioner and his wife were given the right, jointly, by instrument in writing directed to the trustee, to alter, amend, revoke or terminate the trust agreement, or to withdraw any property at any time comprising a portion of the trust estate.

10. If petitioner should survive his wife, he could, by instrument in writing directed to and accepted by the trustee, exercise singly the same powers of alteration or termination.

11. On February 18, 1932, petitioner was 44 years of age. Petitioner's wife, Mary Kaufman Altmaier, was 40 years of age. Petitioner's son, John Martin Altmaier, was 14 years of age. Petitioner's son, Robert David Altmaier, was 12 years of age. Petitioner's daughter, Mary Elizabeth Altmaier, was four years of age, and on December 31, 1933, all of said individuals were living (R. 71).

From the foregoing facts the reviewing court reached the following conclusions:

> (a) The accumulated income of the three trusts in question might inure to the benefit of the grantor and therefore said income was taxable to petitioner under Section 167(a) (1) of the Revenue Act of 1932. In reaching this conclusion the court relied upon the rule announced in *Kaplan vs. Commissioner,* 66 F. 2d 401, 402 (C. C. A. 1).
>
> (b) The fact that petitioner's right to acquire accumulated income of the trust estates depends entirely upon the mere possibility that he shall survive his wife—a circumstance over which he has no control—is no justification for excluding the income of said trusts from the application of the provisions of Section 167(a) (1). In reaching this conclusion the court relied upon the rule announced in *Helvering vs. Hallock,* 309 U. S. 106 (Jan. 29, 1940), and *Klein vs. United States,* 283 U. S. 231, and specifically over-

ruled its own decision in this respect announced in *Corning vs. Commissioner,* 104 F. 2d 329 (C. C. A. 6; June 6, 1939).

(c) Petitioner's wife, Mary Kaufman Altmaier, did not have a substantial adverse interest in said trusts within the meaning of the statute, since she was a member of petitioner's family, and therefore the provisions of Section 167(a) (2) apply for the reason that even during the lifetime of the wife, by joint instrument in writing, the husband and wife would be privileged to withdraw the accumulated income and pay it over to the settlor, and for the reason that the husband and wife acting jointly could terminate the trust at any time. In reaching this conclusion the court relied upon the rule announced in *Helvering vs. Clifford,* 309 U. S. 331.

THE NECESSITY FOR CERTIORARI

Petitioner herein respectfully asserts that the decision of the United States Circuit Court of Appeals in this cause is in conflict with the decisions of other Circuit Courts of Appeals on the same matter; that said United States Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court; that United States Circuit Courts of Appeals in applying the rule announced by this court in *Helvering vs. Hallock* (*supra*) to other forms of federal taxation have reached different and conflicting conclusions with the result that utter confusion exists as to the correct method of applying the rule so announced; and that the United States Circuit Court of Appeals in this case, contrary to the rule announced by this court in *Helvering vs. Wood,* 309 U. S. 344, erroneously decided this case upon an issue which had been previously abandoned and waived by respondent.

THE CONFLICTING DECISIONS

(a) The rule announced in *Kaplan vs. Commissioner, supra,* which was followed by the reviewing court in the

instant case is directly contrary to the rule announced by the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner vs. Waterbury*, 97 F. 2d 383, *certiorari* denied, 305 U. S. 638, with the result that the decision of the reviewing court in the instant case in this respect is also contrary to the rule announced in *Commissioner vs. Waterbury, supra.*

(b) The reviewing court in the instant case places an interpretation upon the rule announced in *Helvering vs. Hallock, supra,* which is directly contrary to the interpretation placed upon the same decision by the Circuit Court of Appeals for the Second Circuit in the case of *Herzog et al. vs. Commissioner*, a case involving federal gift taxes decided on January 6, 1941.

(c) The reviewing court in the instant case places an interpretation upon the decision rendered in the case of *Helvering vs. Clifford, supra,* which is exactly contrary to the interpretation placed upon said decision by the Circuit Court of Appeals for the First Circuit in the case of *Commissioner vs. Branch*, 114 F. 2d 985.

In view of the foregoing and in the interest of securing uniformity of decisions among the several Circuit Courts of Appeals and for the purpose of correcting a decision of the Circuit Court of Appeals for the Sixth Circuit on a question of general federal income tax law which said court has decided in a way in conflict with the weight of authority and in conflict with the meaning and intent of the statutes themselves and consequently in a way probably untenable, it is respectfully prayed that *certiorari* may be granted herein.

JOHN J. KENDRICK,
Counsel for Petitioner.

STATE OF OHIO, LUCAS COUNTY, *ss.*

John J. Kendrick, being duly sworn, says: I am one of the attorneys for the taxpayer in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof; the allegations of fact contained therein are true to the best of my knowledge, information and belief; this petition is not filed for the purpose of delay, and I believe that petitioner is justly entitled to the writ sought.

JOHN J. KENDRICK.

Sworn to before me and subscribed in my presence this .....day of February, 1941.

C. I. BITZ,

(Seal) *Notary Public, Lucas County, Ohio.*

My commission expires January 6, 1942.

BRIEF IN SUPPORT OF PETITION HEREIN

For the sake of brevity the facts involved in the instant case will not be repeated. There is no substantial dispute concerning the same and they have been outlined in detail in the foregoing petition. The interpretation to be placed upon the terms and provisions of Sections 161 and 167 of the Revenue Act of 1932 is the only issue in the case. Said sections of the revenue statute appear in Appendix A attached to this brief.

In order that the confusion and conflict in the various decisions by the lower courts may be clearly portrayed it might be well to traverse the rocky road of decisions, reversals, contrary interpretations upon the same decisions, etc., which have taken place within the past few years in the course of an effort by various tribunals to lay down the correct rule of interpretation to be placed upon Section 167 of the Revenue Act of 1932 and the corresponding sections of prior and later revenue acts.

It might be well for the purpose of clarification to comment upon the statutes here involved, Section 161 and Section 167 of the Revenue Act of 1932 (Appendix, *infra*), since although our primary concern is with Section 167 that section cannot be properly interpreted without reference to Section 161 of which it is expressly made a part.

Section 161 declares all trust income taxable and enumerates four general categories. The first category—contained in subsection (a) (1)—may be generally described as income which the trustee has no discretion to distribute currently, but must, by reason of the restrictions of the trust itself (not merely the normal process of distribution of decedent's estate), hold until some specified time or event in the future. These characteristics distinguish this income from the three other categories mentioned in subsections (a) (2), (3) and (4). Subsection (a) (1) is

further subdivided and covers the whole field of contingent distribution.

Congress also enacted Section 167 as an exception to the general concept of the taxability of trust income announced and analyzed in Section 161. Section 167(a) (1) applies only to the last clause of Section 161(a) (1) and that clause is limited to accumulated income in which the distributee has a vested interest. The pertinent part of Section 167, here involved, taxes to the settlor of a trust (a) income which is held or accumulated for future distribution to him; (b) income which may in his discretion or in the discretion of any person not having a substantial adverse interest in the disposition of such part of the income, be held or accumulated for future distribution to him; and (c) income which may in his discretion or in the discretion of any person not having a substantial adverse interest in the disposition of such part of the income be distributed to him. The term "in the discretion of the grantor" is described in the statute (Section 167(b)) as meaning "in the discretion of the grantor either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question." For a further and more detailed analysis of the relationship between Sections 161 and 167 of the Revenue Act of 1932, reference is made to the decision by the Federal District Court of the Eastern District of Pennsylvania in the case of *Kent vs. Rothensies, Collector*, decided on September 25, 1940, 31 F. Supp. 291.

The two problems of federal income taxation which perhaps have occasioned the most difficulty to lower courts when the issue has been applicability of the provisions of Section 167 of the Revenue Act of 1932 or comparable sections of the other revenue acts, are as follows:

1. The taxability to the grantor of the income of those trusts where the trust instrument provides for a possibility

of a reverter to the grantor time upon a contingency over which the grantor has no control, such as for example, where the instrument provides for a reverter to the grantor if the life tenant should die prior to the death of the grantor; and

2. The taxability to the grantor of the income of those trusts where the trust instrument provides for a power of amendment, alteration or termination of the trust by the grantor in the event of a contingency over which the grantor has no control, such as for example where the instrument provides that the grantor shall have the power to amend, alter or terminate the trust in the event the beneficiary predeceases him.

One of the first cases decided by the courts and having to do with the problem of applying a section of the 1924 Revenue Act (Section 219(h)), which is substantially the same as that part of Section 167 of the Revenue Act of 1932 here involved, is the case of *Kaplan vs. Commissioner*, 66 F. 2d 401. In that case it appeared that the trust instrument there under consideration named the settlor as trustee and provided in substance that the income was payable to the settlor's wife for life with reversion to the settlor if he outlived her and if he did not then to his children. The declaration also permitted the trustee to accumulate "a reasonable portion of the income," such accumulation to be payable at the discretion of the trustee to the person or persons who at the time of payment were entitled to the income of the trust. The Commissioner held that all the income of said trusts was taxable to the settlor and the Board of Tax Appeals affirmed the Commissioner.

The reviewing court modified the decision of the Board but held that since the settlor named himself trustee the large discretion given to him with respect to the accumulation of income and distribution thereof brought the trust squarely within the provisions of the statute (Section

219(h) of the Revenue Act of 1924) which was an exception to the general rule with respect to the taxability of trust income.

In applying the statute (Section 219(h) of the Revenue Act of 1924) the court said:

> "It (the statute) deals with amounts which rest 'in the discretion of the grantor,' etc.; and it operates only on 'such part of the income of the trust' as lies within that discretion."

Here was a clear case where the exception to the general rule applied since the settlor by virtue of the appointment of himself as trustee reserved unto himself a discretion with respect to the accumulation and distribution of income. Unfortunately, however, the reviewing court in the *Kaplan* case, *supra,* indulged in a bit of *obiter dictum* and in speaking again of the interpretation to be placed upon the statute, said:

> "We think the statute means that if under any circumstances or contingencies any part of the accumulated income might inure to the benefit of the grantor, such part of the income is taxable to him."

It is this *obiter dictum* which we respectfully submit has occasioned much of the difficulty and confusion in the later decisions. In this *obiter dictum* the Circuit Court of Appeals for the Second Circuit attempted to broaden the terms of the statute so that they would encompass many more situations than provided for by the statute. As the court correctly stated elsewhere in its opinion the statute deals only with amounts, the accumulation or distribution of which rests in the discretion of the grantor. That we submit is a correct and much narrower application of the statute than to say that it applies when "under any circumstances or contingencies" the accumulated income might inure to the benefit of the grantor. It was upon what we here contend was *obiter dictum* in the *Kaplan* case,

supra, that the reviewing court in the instant case decided against the taxpayer.

After the *Kaplan* case, which was decided on July 24, 1933, there reached the United States Supreme Court the cases of *Helvering vs. St. Louis Union Trust Company*, 296 U. S. 29, and *Becker vs. St. Louis Union Trust Company*, 296 U. S. 48, which involved federal estate taxes and in the decision (November 11, 1935) it was held that a "mere possibility of reverter" was insufficient to require the inclusion in the decedent's estate of property conveyed in trust by decedent in his lifetime.

The Circuit Court of Appeals for the Second Circuit in the case of *Commissioner vs. Waterbury*, 97 F. 2d 383, *certiorari* denied 305 U. S. 638 (June 6, 1938), had for consideration the taxability to the settlor of a trust where, although the income was currently distributable to the named beneficiaries, the settlor could under certain conditions and contingencies amend, revoke or terminate the trust. The only issue in the case was the taxability to the settlor of the income of said trusts under Section 167 of the Revenue Act of 1928. The court held that Section 167 did not apply to such a situation and while the decision rendered by the Circuit Court of Appeals for the First Circuit in the *Kaplan* case, *supra*, was not specifically referred to, the reviewing court in the *Waterbury* case, *supra*, reached a conclusion that was exactly contrary to what we have hereinbefore contended was *obiter dictum* in the *Kaplan* case, *supra*. In that connection the court said:

> "The phrase 'in the discretion of the grantor of the trust' we have held to be 'expressly limited to situations where the distribution or accumulation may be for the benefit of the grantor or not as he alone or in conjunction with anyone not a beneficiary may in his discretion determine.' If the distribution to the grantor with accumulation for future distribution to him occurs without the existence of

any discretionary control by the grantor, Section 167 does not apply.

It is erroneous to assume that because the grantors could acquire the trust property through the exercise of the powers of revocation in future years any income presently retained by the trustee could be taxed under Section 167. At all times during 1929 the taxable gains were not the property of the respondents but were the property of the trust."

Here, therefore, we have direct conflict between the Second Circuit, the First Circuit and the Sixth Circuit with respect to the meaning and interpretation to be placed upon Section 167 of the Revenue Act of 1932 and comparable sections of other revenue acts.

The United States Board of Tax Appeals in several decisions (*William E. Boeing vs. Commissioner*, 37 B. T. A. 178; *Moore vs. Commissioner*, 39 B. T. A. 808, and *Pyeatt vs. Commissioner*, 39 B. T. A. 774) determined that the *St. Louis Union Trust Company* cases, *supra*, narrowed that part of the *Kaplan* decision which we have heretofore in this brief contended was *obiter dictum* by the court deciding that case. Respondent acquiesced in the decisions rendered by the United States Board of Tax Appeals in the *Boeing*, *Moore* and *Pyeatt* cases. (Internal Revenue Bulletins, June 6, 1939, page 1; July 17, 1939, page 1; August 21, 1939, page 1.) Those decisions by the United States Board of Tax Appeals in substance held that the income of a trust is not taxable to the settlor thereof when under the terms of the trust both the accumulated income and the corpus of the trust might revert to the settlor in the event a beneficiary of the trust predeceased the settlor.

On June 6, 1939, the Circuit Court of Appeals for the Sixth Circuit rendered its decision in the case of *Corning vs. Commissioner*, 104 F. 2d 329. In that case federal income taxes for the year 1934 were involved. The issue concerned the taxability to the trustor of the income of a trust.

In the indenture it was provided that the income of the trust during the settlor's life was to be accumulated and added to the corpus and that after the death of the settlor's father the settlor might terminate the trust but such power to so terminate the trust could not be exercised in any event prior to 1937. The reviewing court reversed the Board of Tax Appeals and determined that Section 167 did not apply since the right reserved by the settlor to direct the return to him of the corpus of the trust was contingent upon the death of the petitioner's father during his (the settlor's) lifetime and that thus the petitioner's power to revest himself with the corpus of the trust was subject to a contingency "which might never arise." In that connection the court said:

> "It (the Board of Tax Appeals) draws a distinction between the existence of a power to revoke and the right to exercise that power. Even though the right to exercise the power to revoke may be contingent it says, nevertheless, the existence of the power during the tax year is not contingent.
>
> The distinction is difficult to apprehend. It is not consonant with generally accepted concepts of power, for a power which is not presently exercisable and may never be capable of being exercised does not exist. 1 Sugden on Powers, 3d Amer. Ed. 371, 372. It is difficult, therefore, to comprehend that one may be vested with a power that is not presently nor with certainty exercisable *in futuro*.
>
> * * * It does not follow from this, however, that the Congress in the 1934 Act used either the term 'power' or the term 'vested' in a sense other than these terms were used in the 1928 or preceding Revenue Acts, and the committee reports of the Congress do not so indicate. The term 'power' as used in corresponding sections of earlier acts has not been thought to extend to the reservation of a right conditioned upon a contingency that may never occur. *Commissioner vs. Stokes*, 3d Circuit, 79 F. 2d 256; *Higgins vs. White*, 1st Circuit, 93 F. 2d 357."

In the *Corning* case, *supra,* the Sixth Circuit had for its consideration a situation which differed from those considered by the United States Supreme Court in the *St. Louis Union Trust Company* cases, *supra,* and by the United States Board of Tax Appeals in the *Boeing, Moore* and *Pyeatt* cases, *supra.* In those cases the trust instruments provided for a reversion timed upon a contingency, whereas in the *Corning* case, *supra,* and in the *Waterbury* case, *supra,* the revestment in the grantor could not take place until a power was exercised by the settlor which the Sixth Circuit Court of Appeals in the *Corning* case said would not exist until the contingency upon which it was timed arose. In the instant case the power in the settlor alone to alter, amend or terminate the trust arises only upon the prior decease of his wife, Mary Kaufman Altmaier, and therefore it was asserted by the petitioner here that the rule laid down by the Second Circuit in the *Waterbury* case and by the Sixth Circuit in the *Corning* case controlled and consequently the provisions of Section 167 did not apply.

Then came the decision by this court in the case of *Helvering vs. Hallock,* 309 U. S. 106, which involved federal estate taxes and which specifically reversed the decisions by this court in the *St. Louis Union Trust Company* cases, *supra.* Other cases were considered by the Supreme Court with *Helvering vs. Hallock, supra, Rothensies vs. Huston, and Bryant vs. Helvering.* In all the cases considered, however, the trust agreements provided for a reverter to the settlor upon the prior death of the life tenant but if the life tenant outlived the settlor then the *corpus* was to go in the *Hallock* case to the settlor's children, in the *Huston* case to the life tenant in fee, and in the *Bryant* case to the estate of the settlor upon the death of the life tenant. This court held that in each instance the *corpus* of the trust was to be included in the settlor's gross estate for federal estate tax purposes, relying upon the rule laid

down in the case of *Klein vs. United States*, 283 U. S. 231. In the *Klein* case this court had held that there should be included in the gross estate of a grantor of a trust the *corpus* of the trust, where the decedent had during his lifetime conveyed land to his wife for her lifetime with reversion in fee vested in the decedent grantor if his wife predeceased him.

Thus is appears that in the *St. Louis Union Trust Company* cases, in the *Klein* case, in the *Hallock* case and in the *Boeing, Moore* and *Pyeatt* cases, decided by the United States Board of Tax Appeals (all *supra*) the trust instruments in each instance provided for a reverter to the settlor timed upon a contingency. None of those cases involved a trust where the settlor had a right timed upon a contingency over which he had no control to alter, amend or terminate the trust. The *Waterbury* and the *Corning* cases, *supra*, involved such a situation and the courts in those cases held that Section 167 of the Revenue Act of 1932 or comparable sections of other Revenue Acts did not apply, the Sixth Circuit in the *Corning* case specifically stating that such a power did not in fact exist until the contingency arose.

That this is not a distinction without a difference is pointed out in the case of *Herzog et al vs. Commissioner*, (C. C. A. 2), decided on January 6, 1941. That case involved federal gift taxes. There the question was whether or not there was a sufficient alienation by the settlor to bring upon him liability for gift taxes. The court held that there was such an alienation and that the decision in the *Hallock* case (*supra*) did not control the issue involved, since in the Herzog case there was not a provision for a reverter as in the *Hallock* case, but the trust instrument provided for a power of termination of the trust timed upon the whim of one of the individual trustees named in the agreement. In that connection the court said:

> "Moreover, as we read the opinion in *Helvering vs. St. Louis Union Trust Company*, 296 U. S. 239, no member of the majority or minority of the court suggested that a discretionary power to terminate a trust which was vested solely in the trustee was sufficient to subject the corpus to an estate tax on the ground that it was part of the property of the grantor. While *Helvering vs. St. Louis Union Trust Company* was overruled by *Helvering vs. Hallock*, 309 U. S. 106, because the contingent reversion retained by the grantor subjected the corpus of the trust to an estate tax, nothing was said about the effect of the discretionary power."

In the instant case the Sixth Circuit Court of Appeals decided against petitioner herein because as it stated:

> "The petitioner contends that inasmuch as his right to acquire the accumulated income of the trust estates depends entirely upon the mere possibility that he shall survive his wife—a circumstance over which he has no control—such mere possibility of his acquiring the accumulated income is no justification for bringing the trusts, with which we are concerned, within the provisions of Section 167 of the Revenue Act of 1932.
>
> He urges upon us *Corning vs. Commissioner*, 104 F. 2d 329 (C. C. A. 6), (June 6, 1939), which with respect to 'possibility of reverter' dutifully applied the doctrine of *Helvering vs. St. Louis Trust Company*, 296 U. S. 39. But the *Corning* case is no longer authority upon the subject, for the reason that the Supreme Court in *Helvering vs. Hallock*, 309 U. S. 106 (June 29, 1940) reversing 102 F. 2d 1 (C. C. A. 6), expressely overruled *Helvering vs. St. Louis Trust Company, supra*, and *Becker vs. St. Louis Trust Company*, 296 U. S. 39, as untenable departures from the doctrine of *Klein vs. United States*, 283 U. S. 231, which was distinctly approved."

Thus we submit the Sixth Circuit Court of Appeals in the instant case reversed its decision upon the *Corning* case upon a misapprehension of what the case of *Helver-*

ing vs. Hallock held. The United States Board of Tax Appeals on the other hand refuses to concede that *Helvering vs. Hallock, supra*, has any such interpretation as is placed upon that decision by the Sixth Circuit Court of Appeals in the instant case. In *McLean vs. Commissioner*, 41 B. T. A. 565 (March 8, 1940) the Board said at page 578:

> "The two *St. Louis Union Trust Company* cases cited in the above quotation are no longer to be followed. *Helvering vs. Hallock*, 309 U. S. 106 (January 29, 1940). However, those cases had to do with estate tax, and the *Boeing*, the *Moore* and the present case have to do with income tax. The *St. Louis Union Trust Company* cases were merely referred to and not relied upon in the *Boeing* case; consequently there is no reason why the Board should fail to follow the *Boeing* and the *Moore* cases in the present case."

As an added reason for denying the appeal of petitioner herein the Sixth Circuit Court of Appeals held that the income of the trusts here in question was taxable to settlor (petitioner herein) for the reason that during the joint lives of settlor and his wife (Mary Kaufman Altmaier) they, acting jointly, could terminate the trust at any time. The court interpreted the decision of the Supreme court in *Helvering vs. Clifford*, 309 U. S. 331 (decided February 26, 1940) to mean that where the beneficiary who had "a substantial adverse interest in the disposition of the corpus" was the wife of the settlor, the wife by virtue of her relationship to the settlor is not a person "having a substantial adverse interest" within the meaning of the statute. This interpretation by the Sixth Circuit Court of Appeals of the decision of this court in the case of *Helvering vs. Clifford, supra*, is exactly contrary to the decision by the Circuit Court of Appeals for the First Circuit in the case of *Commissioner vs. Branch*, 114 F. 2d 985 (Oct. 23, 1940). The court in that case in

interpreting the decision of this court in *Helvering vs. Clifford, supra,* said:

> "We do not understand that the case as a general proposition obliterates the separate legal personality of the wife for purposes of determining the gross income of the husband under Section 22 (a)."

In this connection we also direct the attention of the court to the case of *Helvering vs. Wood,* 309 U. S. 344, where this court held that it would not consider the issue as to whether income was taxable under Section 22 (a) of the Revenue Act because that issue was not submitted to the Board of Tax Appeals or to the court below and had been expressly waived by the Commissioner in his brief before the Circuit Court of Appeals. In the instant case such an express waiver and abandonment of the very issue now raised by the Sixth Circuit Court of Appeals is shown by the record (pp. 13 and 14) where the Commissioner in his deficiency notice makes the following statement:

> "The only power to revoke or withdraw the trust in whole or in part was by a joint written instrument by Mrs. O. C. Altmaier and yourself and inasmuch as she holds a substantial beneficial interest in each of the trusts, this provision cannot be made the basis for treating the trusts as being revocable.
>
> In Bureau letter dated October 17, 1935, you were advised that your contention, that under the provisions of Section 166 of the Revenue Act of 1932 the trusts were irrevocable, was conceded. In the same communication, however, you were advised that under the provisions of Section 167 of the same Act it was evident that the income from the trust funds may be taxable to you. * * *
>
> Under the provisions of Section 167 of the Revenue Act of 1932 above cited and the terms of the trust instrument, it is the contention of the Bureau that the income of these trusts may eventually be paid to the settlor of the trusts and for these reasons the Bureau holds the income accruing on them should be taxable to you, the settlor."

In the opening statement by counsel for respondent before the United States Board of Tax Appeals (R. 67) the issue in the case was very definitely narrowed down to the applicability of Section 167 of the Revenue Act of 1932. Petitioner herein therefore holds that when the Circuit Court of Appeals for the Sixth Circuit introduces this issue into the case it violates the rule announced by this court in *Helvering vs. Wood, supra.*

Because of the many conflicts in decisions dealing with the very same subject matter as that involved in the instant case between the Circuit Court of Appeals for the Sixth Circuit and the Circuit Courts of Appeals for other courts above cited and because said Circuit Court of Appeals for the Sixth Circuit has decided an important question of tax law in a way probably untenable because in conflict with the decided weight of authority, including that of this court, it is respectfully submitted that *certiorari* should be granted herein.

Respectfully submitted,

O. C. ALTMAIER,

By JOHN J. KENDRICK,
Attorney.

APPENDIX A

Section 161 of the Revenue Act of 1932:

(a) "The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) The tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary, except as provided in Section 166 (relating to revocable trusts) and Section 167 (relating to income for benefit of the grantor)."

Section 167 of the Revenue Act of 1932:

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or any person not having a substantial adverse interest in the disposition of such part of the income be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, may be applied to the payment of premiums upon policies of

insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in Section 23(n) relating to the so-called 'charitable contribution' deduction); then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term 'in the discretion of the grantor' means 'in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question'."

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 774

O. C. ALTMAIER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 52–60) is not reported. The opinion of the Circuit Court of Appeals (R. 90–95) is reported in 116 F. (2d) 162.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 13, 1940 (R. 89). The petition for writ of certiorari was filed February 19, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the income for the years 1932 and 1933 from three trusts is taxable to the grantor under Section 167 of the Revenue Act of 1932.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9–14.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 52–58) and stipulated by the parties (R. 67–82), may be summarized as follows:

On February 18, 1932, the taxpayer created three separate trusts which are identical except that the residuary beneficiary in each one is a different minor child of the taxpayer (R. 52). The corpus of each trust consists of 1,200 shares of the common stock of Columbus Coated Fabrics Corporation (R. 67–70). The wife of the taxpayer was named the sole trustee when the trusts were created, but on September 28, 1932, The City National Bank & Trust Company of Columbus was appointed co-trustee (R. 52).

The trust agreements provide that the income of the trust property is to be accumulated and added to principal during the life of the taxpayer or until the death of his wife, should she prede-

cease him (R. 72). Beginning at the death of the taxpayer, should he predecease his wife, the net income derived from the investment and reinvestment of the trust estates is to be paid to the wife for the remainder of her life, and the principal is also to be paid to her if she wishes to withdraw it. Beginning at the death of the wife, should she predecease the taxpayer, the net income derived from the investment and reinvestment of the trust estates is to be paid to the taxpayer for the remainder of his life (R. 72–73.) Upon the death of the survivor of the taxpayer and his wife, parts of the principal of each trust are to be distributed to the child named as residuary beneficiary of that trust at stated ages, or to his next of kin, and the income from the undistributed parts is to be paid to him or his next of kin (R. 73–76).

The taxpayer, by specific provisions of the trust agreements, reserved the following powers: (1) jointly with his wife, to require the trustee to mortgage, pledge, hypothecate, transfer and/or assign the trust property for the purpose of providing collateral security for indebtedness of himself or of his wife, or of persons, corporations, etc., designated by them, with no obligation of reimbursement except that excess collateral, or its value, is to be returned to the trust estates (R. 77–78); (2) to direct the purchase and sale of investments for the trust estates (R. 78); (3) jointly with his wife during their joint lives and after her

death by himself alone, to alter, amend, revoke, or terminate the trust agreements or withdraw property from the trust estates without the necessity of reimbursement (R. 78–79); (4) to exercise the voting power of stock in the trust estates (R. 79–80); and (5) to discharge the trustee upon thirty days' written notice (R. 81).

On the date the trusts were established, the taxpayer was 44 years of age, his wife was 40, and his three children were 14, 12, and 4, respectively. They were all living on December 31, 1933. (R. 57–58.)

The taxpayer did not include the trust income in his income tax returns for 1932 or 1933 (R. 70). The Commissioner determined that the trust income was taxable to the taxpayer under Section 167 of the Revenue Act of 1932 and assessed deficiencies accordingly (R. 58). The Board of Tax Appeals sustained his determination (R. 60), and the Circuit Court of Appeals affirmed (R. 89).

ARGUMENT

1. The income under the trusts is being accumulated and added to the principal. It is being accumulated for future distribution to the taxpayer because upon the death of his wife he may, in his sole discretion, alter, amend, revoke, or terminate the trusts and withdraw any property therefrom (R. 78–79). In this situation, the decision of the court below that Section 167 (a) (1) applies is

clearly correct. The decision is supported by *Kaplan* v. *Commissioner,* 66 F. (2d) 401 (C. C. A. 1st). See also *Frost* v. *Commissioner,* 38 B. T. A. 1402. In all cases since *Helvering* v. *Hallock,* 309 U. S. 106, the statute has been applied where the contingency is the survival of one other person by the grantor. See *Graff* v. *Commissioner,* 40 B. T. A. 920, affirmed, January 14, 1941, by the Circuit Court of Appeals for the Seventh Circuit, not yet officially reported but found in 1941 C. C. H., Vol. 4, ¶9188; *Armour* v. *Commissioner,* 41 B. T. A. 777, 794–796; *Phipps* v. *Commissioner,* 42 B. T. A. 329. The *Kaplan* decision was followed in *First Nat. Bank* v. *Commissioner,* 110 F. (2d) 448 (C. C. A. 7th), where the grantor could not get the accumulated income for three years.

Herzog v. *Commissioner,* 116 F. (2d) 591 (C. C. A. 2d), does not suggest that *Helvering* v. *Hallock, supra,* has been pressed too far here. That was a gift tax case where the discretionary power was vested solely in the trustee and where the grantor had no right of any kind ever to get the income.

There is no conflict with *Commissioner* v. *Waterbury,* 97 F. (2d) 383 (C. C. A. 2d). That case arose under Section 167 of the Revenue Act of 1928, c. 852, 45 Stat. 791, which, unlike the Revenue Act of 1932, involved here, dealt exclusively with cases where the accumulation of income was in the discretion of the grantor. The accumulation in the *Waterbury* case was due solely to the

fact that capital gains were realized in the taxable year which were not currently distributable. The accumulation here is required by the trust provisions and the applicable statute reaches cases where there is accumulation in fact, as well as where the accumulation is within the grantor's discretion. This Court denied certiorari in the *Waterbury* case, 305 U. S. 638, despite a claimed conflict with the *Kaplan* case.

2. The court below also rested its decision in part upon the provisions of Section 167 (a) (2), which it held to be applicable because the taxpayer could secure the accumulated income even during the lifetime of his wife by a joint instrument in writing. The taxpayer contends that this is erroneous for the reason that if his wife survives him she will have power to withdraw the principal and therefore cannot be considered as a person without "a substantial adverse interest" in the disposition of the accumulated income. The Circuit Court of Appeals held otherwise, relying upon "the normal consequences of family solidarity" which influenced the decisions of this Court in *Helvering* v. *Clifford,* 309 U. S. 331, and *Helvering* v. *Horst,* decided November 25, 1940, No. 27, present Term. A similar dependence upon the family relationship was employed in *Cox* v. *Commissioner,* 110 F. (2d) 934 (C. C. A. 10th), certiorari denied, October 14, 1940. The comment in the opinion in *Commissioner* v. *Branch,* 114 F.

(2d) 985 (C. C. A. 1st), to which the taxpayer refers (Br. 20), merely expresses a doubt that the *Clifford* case authorizes taxing the grantor of a trust under Section 22 (a) for the reason that the income beneficiary is his wife. It is not remotely in point here.

Moreover, the current accumulation of the income, coupled with the right of the taxpayer to revoke the trust after the death of his wife, is an independent reason supporting the application of Section 167 (a) (2). The statute does not specify any particular time when the grantor must possess the requisite discretion.

3. There is no basis for taxpayer's contention that the court below has decided this case upon an issue which had been previously abandoned (Pet. 6). Petitioner relies upon a statement in the deficiency notice (R. 13) to the effect that the wife holds a substantial beneficial interest in each of the trusts. This was said with reference to Section 166, and it was conceded that the trusts were irrevocable under that section. However, in the same letter, the Commissioner relied upon Section 167 (a) (1) and (2). The case was decided by the Board of Tax Appeals under Section 167, and the Circuit Court of Appeals likewise placed its decision upon the application of Section 167 (a) (1) and (2). In *Helvering* v. *Wood*, 309 U. S. 344, upon which taxpayer relies, the Commissioner had

expressly waived the point in the Circuit Court of Appeals.

CONCLUSION

The decision of the court below is correct. There is no conflict with the decision of any other circuit court of appeals or with any decision of this Court. No question of general importance is presented. The petition should be denied.

Respectfully submitted.

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MARCH 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after the date of the enactment of this Act, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

* * * * *

SEC. 166. REVOCABLE TRUSTS.

Where at any time during the taxable year the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition

of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (n), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not hav-

ing a substantial adverse interest in the disposition of the part of the income in question."

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

> ART. 881. *Income of trusts taxable to grantor.*—In the case of certain trusts which are in whole or in part subject to revocation by the grantor or by any person not having a substantial adverse interest, or which are for the benefit of the grantor, the income of the trust is to be included in computing the net income of the grantor. The income of such trusts must be so included, whether or not the trust was created before the enactment of the Revenue Act of 1932. The cases in which the income of the trust is to be included, in whole or in part, in computing the net income of the grantor are as follows:
>
> (1) Where at any time during the taxable year the power to revest in the grantor title to any part of the corpus of the trust is vested—
>
> (*a*) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or
>
> (*b*) In any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,
>
> then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor. The grantor shall include in his income the entire gross income of such part of the trust, and shall be entitled to such deductions with

reference to such income as he would have been entitled to if the trust had not been created. Where the grantor relinquishes during the taxable year his power to revest in himself title to the corpus of the trust and the power does not remain in any person not having a substantial adverse interest in the disposition of the corpus of the trust or the income therefrom, the income of the trust shall be taxable to the grantor only for the period during which he had such power.

(2) Where any part of the income of a trust—

(*a*) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(*b*) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(*c*) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (n), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

As used in this article, the term "in the discretion of the grantor" means "in the

discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question," and the term "substantial adverse interest" means "substantial interest in the trust adverse to the grantor."

H. Rept. No. 179, 68th Cong., 1st Sess., p. 21 (1939–1 Cum. Bull. (Part 2) 256):

> SECTION 219: This section has been rewritten in order to secure clarity and to prevent the evasion of taxes by means of estates and trusts. The changes made are quite important.
>
> * * * * *
>
> Subdivision (h) of this section provides that the income of a trust which may be distributed to the grantor or which may be used for the payment of premiums upon policies of insurance on his life shall be included in the gross income of the grantor. Trusts have been used to evade taxes by means of provisions allowing the distribution of the income to the grantor or its use for his benefit. The purpose of this subdivision of the bill is to stop this evasion.

S. Rept. No. 665, 72d Cong., 1st Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 521):

> As in the case of the preceding section, attempted avoidance of the provisions of this section, relating to income held or accumulated for the grantor, has rendered expedient a change in its wording to check certain recent practices. The present law taxes the income of a trust to the grantor when in his discretion, either alone or in conjunction with a person not a beneficiary, the trust income may be held or accumu-

lated for future distribution to him, or is or may be applied to the payment of premiums upon insurance policies on the grantor's life. Trusts have been established in which income is held or accumulated for the grantor, which fact, it is contended, removes such trusts from the operation of this section. Here again, it is not at all certain that the courts will uphold such devices; yet the statute may well be clarified to remove any doubt that the income of such trusts is to be taxed to the grantors. In the House bill, the section has been amended to provide that there shall be taxed to the grantor of a trust any part of the income of the trust which (1) is, or in the grantor's discretion may be, held or accumulated for future distribution to him, or (2) may, in the grantor's discretion, be distributed to him, or (3) is, or in the grantor's discretion may be, applied to the payment of premiums upon policies of insurance on his life. Your committee has further amended the section so as to cover, in addition, cases in which the discretion as to the disposition of the income is in any person not having a substantial adverse interest in the disposition of such income, even though such discretionary power is not shared with the grantor. The House bill added a subsection defining the term "in the discretion of the grantor," so as to include within the purview of the section cases in which the discretion is in the grantor in conjunction with any person not having a substantial adverse interest in the disposition of the income in question.

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